

² As of October 31, 2011, Ms. Sample has been replaced on the Board by Mr. Gary Terrill. However because this case had been originally scheduled for October 21, 2011, before his appointment to the Board, Mr. Terrill has recused himself from this appeal. Accordingly, Mr. Seiwert will continue to serve as a Board Member Pro Tem in this case.

Matthew L. Bretz of Hutchinson, Kansas, appeared for Anita K. Hillebert. Don A. Peterson of Kansas City, Missouri, appeared for respondent. David J. Berkowitz of Lawrence, Kansas, appeared for the Kansas Workers Compensation Fund (Fund). Alesha Hillebert and Bradley Hillebert, adult children of the decedent, filed briefs and appeared pro se.

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, during oral argument to the Board, the parties stipulated that Alesha Hillebert and Bradley Hillebert are the children of the decedent.

ISSUES

In the August 2, 2011, Award, ALJ Avery denied death benefits to Anita K. Hillebert, finding "it is apparent the actual marriage relationship had been abandoned."³ The ALJ awarded death benefits in the total amount of \$25,000, or \$12,500 each, to Bradley Hillebert and Alesha Hillebert, the decedent's two adult children, and ordered the Fund to provide those payments.

Anita K. Hillebert contends that a common law marriage existed between her and the decedent. She asserts that neither she nor the decedent had abandoned their marriage during the six months before the decedent's death and that she was a dependent.

Respondent does not dispute the existence of a common law marriage but argues it is not relevant because Anita Hillebert and the decedent abandoned their relationship within the meaning and intent of K.S.A. 2009 Supp. 44-508(c)(2). Respondent maintains the substantial and credible evidence establishes that either Anita Hillebert abandoned or she and the decedent mutually abandoned the common law marriage or other relationship, if any, more than six months before the decedent's death. Respondent submits the ALJ's judgment denying benefits to Anita Hillebert as the surviving spouse should be affirmed but that the award of benefits to the two adult children should be reversed as they filed no timely written claim for compensation.

The Fund likewise maintains Anita Hillebert was not a dependent as defined by statute and that the evidence clearly establishes there was a mutual abandonment of the common law marriage more than six months before the decedent's death. The Fund requests the Board to uphold the ALJ's decision as to Anita Hillebert but reverse the award of benefits to the two adult children of the decedent.

The issues before the Board on this appeal are: Did Roy W. Hillebert, Deceased, and Anita Hillebert abandon their common law marriage more than six months before his

³ ALJ Award (Aug. 2, 2011) at 3.

work-related accidental death? If so, are the adult children of the decedent entitled to benefits?

FINDINGS OF FACT

Roy Hillebert (decedent) was fatally injured on April 1, 2010, as a result of carbon monoxide poisoning in a work-related accident while working for respondent. Decedent and Anita Hillebert had begun to date in 1977 and in 1981 became common law husband and wife. They did not have a formal marriage ceremony, but they went to a bank and had a document notarized that she wanted to take the decedent's surname for Social Security. Anita Hillebert said she and the decedent considered themselves to be married when that document was notarized. Neither had been married to anyone else, they were both of age, and they held themselves out to the public as being married. In 1988, they moved to Eudora, Kansas, to be close to the decedent's family. Neither of them ever filed for legal separation or divorce. They had two children together, Alesha Hillebert and Bradley Hillebert, both of whom were adults at the time of decedent's death.

Anita Hillebert became ill and was hospitalized in 2001. Because of her large medical bills, she and the decedent took Chapter 13 bankruptcy, but they lost their house. Anita Hillebert testified that she moved from Eudora to Kansas City in 2001 or 2002 and lived with a girlfriend. At the time, the decedent was living with his parents in Eudora. Anita Hillebert said there were about eight people living in decedent's parents' two-bedroom mobile home and there was no room for her there. She said the decedent provided her with support while she was trying to find a job.

Anita Hillebert said that she lived with her girlfriend until she got a job as a personal assistant for Richard Heinrich, a man 30 years her senior.⁴ She then moved in with Mr. Heinrich and lived with him for four years. The decedent had moved in with their son, Bradley. Anita Hillebert said that she and the decedent were hopeful of saving enough money to find a place to live together. She said she would come back to visit with their children and would see the decedent at the same time. There were times that she would stay overnight with the decedent.

In November 2008, Anita Hillebert's job with Mr. Heinrich ended, and she became a personal assistant for Mark Platt. Her job entailed running errands, keeping the house, cooking, laundry, and paying bills. She said when she first started working for Mr. Platt, he asked her if she wanted to get married, but she told him she was already married. She and Mr. Platt are friends, and he provides for her support. She and Mr. Platt applied online to join a singles' club named C4P, and they are registered as the "Spice of Life." She said they have gone to swingers' clubs, but go for the food and drinks and to dance. Anita Hillebert said she and Mr. Platt do not have a sexual relationship and they did not

⁴ Anita Hillebert could not remember when she started working for Mr. Heinrich.

participate in a sexual relationship with anyone who belonged to the swingers' clubs. They also go out to dinner and to movies. Once in a while, Mr. Platt would attend family functions with her. Mr. Platt attended decedent's funeral with her.

Anita Hillebert entered as exhibits some of decedent's pay stubs from 2006 to 2009 that showed his status listed as "married/married filing jointly."⁵ She also entered as exhibits several tax returns. On her 2005 tax return, she marked the box indicating she was married filing separately. Her spouse was listed as Roy W. Hillebert. There were no tax returns for 2006 or 2007. She testified that in 2007, Mr. Heinrich listed her as a dependent on his taxes. Anita Hillebert said Mr. Platt listed her as a dependent on his 2008 and 2009 tax returns. In January 2011, she signed tax returns for 2008 and 2009 in order to catch up on her taxes for previous years. Again, she indicated she was married, filing separately and that Roy W. Hillebert was her spouse.

Anita Hillebert testified that she and decedent were not living together for the six-month period before his death. However, she said they remained in contact during that period. She testified they would go out and attend all the children's and grandchildren's birthdays. Anita Hillebert said the decedent would buy her dinner and give her cash. She said she spent Christmas 2009 with the decedent, but later said that Mr. Platt was also there.

Bradley Hillebert testified that his father lived with him and Bradley's girlfriend and that at times Anita Hillebert would spend the night with them. He said his mother moved to Kansas City because of family problems, arguments, and the financial situation. At one point, Bradley testified that the last time his mother spent the night with them was Christmas. Later, he testified that in the six month period before his father died, his mother would visit two or three times a month and would spend the night about two of the three times. He said although his parents argued, they still got together at family gatherings and went out together. Bradley knew that his mother and Mr. Platt were roommates, but he did not know of any romantic involvement between the two. His parents never filed for a divorce or for a legal separation.

Alesha Hillebert testified that her mother moved to Kansas City about five years ago. She said her mother would visit on birthdays, holidays, and every now and again on weekends. She said her mother stayed with Bradley and the decedent when she visited. Alesha and her father never discussed why Anita Hillebert left, and he would just say they were separated. Alesha testified that even though her parents lived apart, they always maintained a close relationship and neither one abandoned or deserted the other. Neither filed for divorce or legal separation.

⁵ Anita Hillebert Depo., Cl. Ex. 5 and 6.

Tena Santalauria testified that she met the decedent in the fall of 2005 and they eventually began to date and developed a relationship. She said the decedent told her about his common law marriage. She said he was very sad about the breakup between him and Anita Hillebert, and he talked about Anita Hillebert leaving to live with another man. Ms. Santalauria dated the decedent about a year, after which they remained friends. Ms. Santalauria said the decedent referred to Anita Hillebert as his wife in their conversations, but he did not represent to her that he was still married.

PRINCIPLES OF LAW

Where death results from an injury, K.S.A. 2009 Supp. 44-510b provides:

(a) If an employee leaves any dependents wholly dependent upon the employee's earnings at the time of the accident, all compensation benefits under this section shall be paid to such dependent persons. . . . [S]uch dependents shall be paid weekly compensation, except as otherwise provided in this section, in a total sum to all such dependents, equal to 66 2/3% of the average gross weekly wage of the employee at the time of the accident, computed as provided in K.S.A. 44-511 and amendments thereto, but in no event shall such weekly benefits exceed the maximum weekly benefits provided in K.S.A. 44-510c and amendments thereto, nor be less than a minimum weekly benefit of the dollar amount nearest to 50% of the state's average weekly wage as determined pursuant to K.S.A. 44-511 and amendments thereto subject to the following:

....
(2) A surviving legal spouse shall be paid compensation benefits for life, except as otherwise provided in this section.

....
(d) If an employee does not leave any dependents, either wholly or partially dependent upon the employee, a lump-sum payment of \$25,000 shall be made to the legal heirs of such employee in accordance with Kansas law. However under no circumstances shall such payment escheat to the state. Notwithstanding the provisions of this subsection, no such payment shall be required if the employer has procured a life insurance policy, with beneficiaries designated by the employee, providing coverage in an amount not less than \$18,500.

The maximum amount of compensation benefits payable under K.S.A. 2009 Supp. 44-510b shall not exceed the amount of \$250,000.⁶

The statute governing death benefits, K.S.A. 2009 Supp. 44-510b, does not define the phrase "surviving legal spouse." But K.S.A. 2009 Supp. 44-508, defines the phrase "members of a family" which addresses the phrase "surviving legal spouse." That statute provides, in part:

⁶ K.S.A. 2009 Supp. 44-510b(h).

(c)(1) "Dependents" means such members of the employee's family as were wholly or in part dependent upon the employee at the time of the accident.

(2) "Members of a family" means only surviving legal spouse and children In the meaning of this section, a surviving spouse shall not be regarded as a dependent of a deceased employee or as a member of the family, if the surviving spouse shall have for more than six months willfully or voluntarily deserted or abandoned the employee prior to the date of the employee's death.

In *Brinkmeyer*,⁷ the Kansas Supreme Court held "a surviving legal spouse is conclusively presumed to be wholly dependent upon the deceased workman, and is entitled to the benefits provided by the act for a surviving legal spouse, without proof of dependency."

And the appellate courts have held that a surviving spouse is not entitled to receive compensation under K.S.A. 2009 Supp. 44-510b when the spouse abandoned the deceased employee or when there has been a mutual abandonment of the marriage. In *Redditt*,⁸ the Kansas Court of Appeals held:

The plain language of K.S.A. 1999 Supp. 44-508(c)(2) suggests that the Kansas Legislature did not mean to preclude application of the doctrine of mutual abandonment. The statute merely states that a surviving spouse is not eligible for death benefits if he or she abandoned the employee spouse for more than 6 months prior to the employee's death. Under the plain language of the statute, a surviving spouse could later abandon the marriage even after he or she had previously been abandoned by the employee. It is a fundamental rule of statutory construction that the intent of the legislature governs if that intent can be ascertained. (Citation omitted.)

The concept of mutual abandonment fits squarely within K.S.A. 1999 Supp. 44-508(c)(2). We see nothing in the plain language of the statute which would convince us that the legislature did not envision a situation where both spouses abandoned their marriage. However, the facts of the instant case will determine whether mutual abandonment took place.

K.S.A. 44-520a(a) states:

No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified

⁷ *Brinkmeyer v. City of Wichita*, 223 Kan. 393, 397, 573 P.2d 1044 (1978).

⁸ *Redditt v. McDonald's Restaurant*, 28 Kan. App. 2d 802, 805, 20 P.3d 1286, rev. denied 271 Kan. 1037 (2001); see also *Redditt v. McDonald's Restaurant*, 26 Kan. App. 2d 547, 990 P.2d 759 (1999); *Devore v. Inner City Oil Co.*, No. 256,742, 2008 WL 5484139 (Kan. WCAB Dec. 31, 2008); *Mutziger v. Home Distributing Co.*, No. 1,018,165, 2008 WL 4763706 (Kan. WCAB Sept. 29, 2008).

mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.⁹

ANALYSIS

The Board finds that Anita Hillebert and Roy Hillebert mutually abandoned their common law marriage more than six months before the death of the decedent, Roy Hillebert. The couple separated in or about 2001 due to financial hardships caused, in part, by Anita's medical condition. At the time of the decedent's death, Anita Hillebert had not resided with the decedent for approximately eight years. Yet at least by 2005, Anita Hillebert had recovered from her illness and the couple had discharged their bills in bankruptcy. At the time of his death, claimant was working and had an annual income of approximately \$42,000. As such, the medical and financial circumstances that had initially led to the separation had long since changed, yet the parties chose not to reunite. There is no explanation for the couples' continued separation other than that the two had apparently decided to move on and not to live together as husband and wife. The ALJ's findings and conclusions are affirmed.

Based upon this finding of a mutual abandonment of the marriage, the decedent did not leave any dependents. As such, his two adult children are entitled to share equally the \$25,000 lump sum payment required by K.S.A. 2009 Supp. 44-510b(d). There is no evidence that the employer procured a life insurance policy on the life of the decedent.

Although neither adult child personally filed a written claim for compensation within a year of the death of the decedent, their interests were protected and preserved by the timely filing of a claim by Anita Hillebert. That pleading initiated a claim for death benefits under the Workers Compensation Act, not only for the dependents but also for the payment of other compensation, such as medical and burial expenses. K.S.A. 44-520a(a) requires that "a written claim" be served upon the employer. It does not require multiple or separate claims. It is undisputed that a timely written claim for compensation was served upon the employer by the attorney for Anita Hillebert.

CONCLUSION

Anita Hillebert and the decedent mutually abandoned their marriage more than six months before decedent's work-related accident and death. As the decedent did not leave

⁹ See *Smith v. Brown & Brown, Inc.*, Docket No. 267,874, 2006 WL 2328057 (Kan. WCAB July 28, 2006); *Smith v. Brown & Brown, Inc.*, Docket No. 267,874, 2003 WL 1918558 (Kan. WCAB March 26, 2003).

any dependents, the two surviving adult children of the decedent, namely Alesha Hillebert and Bradley Hillebert, are entitled to equally share the \$25,000 lump sum payment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated August 2, 2011, is affirmed.

IT IS SO ORDERED.

Dated this ____ day of December, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Matthew L. Bretz, Attorney for Anita K. Hillebert
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